

2006 WL 2382436 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

July 7, 2006

*1 Jo Anne Anderson
Executive Director
Education Oversight Committee
Post Office Box 11867
Columbia, South Carolina 29211

Dear Ms. Anderson:

We received your request for an opinion concerning dual office holding with regard to an individual simultaneously serving as a member of the Education Oversight Committee (the "EOC") and as a member of the Public Charter School District Board of Trustees (the "Board"). You state in your letter: "The EOC has appointed Thomas DeLoach to serve on the Public Charter School District Board of Trustees. Mr. DeLoach is a member of the EOC. Does this EOC appointment of Mr. DeLoach as its representative violate the exclusion of dual office holding?" Assuming Mr. DeLoach's appointment is by virtue of his membership in EOC, we do not believe he is in violation of the constitutional prohibition against dual office holding.

Law/Analysis

Article XVII, section 1A of the South Carolina Constitution (Supp. 2005) prohibits a person from holding "two offices of honor or profit at the same time, but any person holding another office may at the same time be an officer in the militia, member of a lawfully and regularly organized fire department, constable, or a notary public." In order to contravene this provision, a person concurrently must hold two offices having duties that involve the exercise of some portion of the sovereign power of the State. Sanders v. Belue, 78 S.C. 171, 174, S.E. 762, 763 (1907). Furthermore, our courts recognize other relevant considerations in determining whether an individual holds an office, such as, whether a statute, or other such authority, establishes the position, proscribes the position's duties or salary, or requires qualifications or an oath for the position. State v. Crenshaw, 274 S.C. 475, 477, 266 S.E.2d 61, 62 (1980).

In prior opinions, this Office concluded a member of the EOC holds an office for dual office holding purposes. Op. S.C. Atty. Gen., April 28, 2006; January 23, 2002. Thus, we must determine whether a member of the Board is also an officer for dual office holding purposes to resolve whether or not Mr. DeLoach may serve in both capacities without violating the dual office holding provision of the South Carolina Constitution.

As you mentioned in your letter, the South Carolina General Assembly passed legislation creating a statewide charter school district during this year's session. 2006 Act No. 274. As part of this legislation, the General Assembly enacted section 59-40-230(A). This statute provides:

(A) The South Carolina Public Charter School District must be governed by a board of trustees consisting of not more than eleven members:

- (1) two appointed by the Governor;
- (2) one appointed by the Speaker of the House of Representatives;
- (3) one appointed by the President Pro Tempore of the Senate; and

(4) seven to be appointed by the Governor upon the recommendation of the:

- *2 (a) South Carolina Association of Public Charter Schools and one additional representative from the association;
- (b) South Carolina Association of School Administrators;
- (c) South Carolina Chamber of Commerce;
- (d) South Carolina Education Oversight Committee;
- (e) South Carolina School Boards Association;
- (f) South Carolina Alliance of Black Educators.

The nine members appointed by the Governor pursuant to this subsection are subject to advice and consent of the Senate. Membership of the committee must reflect representatives from each of the entities in item (A)(4) or their designee as reflected in their recommendation.

Each member of the board of trustees shall serve terms of three years, except that, for the initial members, two appointed by the Governor, one by the Speaker of the House, and one by the President Pro Tempore of the Senate, shall serve terms of one year and three appointed by the Governor shall serve terms of two years. A member of the board may be removed after appointment pursuant to Section 1-3-240. In making appointments, every effort must be made to ensure that all geographic areas of the State are represented and that the membership reflects urban and rural areas of the State as well as the ethnic diversity of the State.

(B) The South Carolina Public Charter School District Board of Trustees has the same powers, rights, and responsibilities with respect to charter schools as other school district boards of trustees of this State including, but not limited to, sponsoring charter schools and applying for federal charter school grants, except that the South Carolina Public Charter School District Board of Trustees may not offer application for a charter school, issue bonds, or levy taxes.

(C) The South Carolina Public Charter School District Board of Trustees annually shall elect a chairman and other officers, as it considers necessary from among its membership.

(D) Members of the South Carolina Public Charter School District Board of Trustees are not eligible to receive compensation but are eligible for per diem, mileage, and subsistence as provided by law for members of state boards, committees, and commissions.

(E) The South Carolina Public Charter School District Board of Trustees shall:

- (1) exercise general supervision over public charter schools sponsored by the district;
- (2) grant charter status to qualifying applicants for public charter schools pursuant to this chapter;
- (3) adopt and use an official seal in the authentication of its acts;
- (4) keep a record of its proceedings;
- (5) adopt rules of governance;

- (6) determine the policy of the district and the work undertaken by it;
 - (7) prepare a budget for expenditures necessary for the proper maintenance of the board and the accomplishment of its purpose;
 - (8) keep financial records in accordance with state and federal accounting codes and procedures;
 - (9) comply with and ensure compliance of applicable state and federal regulations;
 - *3 (10) procure an outside annual certified financial audit on funds and submit to the State Department of Education as required by the State Department of Education;
 - (11) be subject to the Freedom of Information Act;
 - (12) have the power to hire and fire the superintendent of the district who may have staff as needed.
- (F) The South Carolina Public Charter School District Board of Trustees may contract, sue, and be sued.

2006 Act No. 274.

At first blush, membership on the Board appears to be an office for dual office holding purposes. Section 59-40-230 establishes the Board and proscribes a term for each member. Although this statute does not provide a detailed list of qualifications, it requires "every effort must be made to ensure that all geographic areas of the State are represented and that the membership reflects urban and rural areas of the State as well as the ethnic diversity of the State." S.C. Code Ann. § 59-40-230(A). In addition, it sets forth specific requirements as to the make up of the board with regard to gubernatorially appointed members. *Id.* However, section 59-40-230 does not indicate an oath requirement. The statute specifically states members "are not eligible to receive compensation," but allows members to be reimbursed for certain expenses they incur. *Id.* § 59-40-230(D). Subsection (B) states the Board's duties and responsibilities are the same as those of other school district boards of trustees. *Id.* § 59-40-230(B). Furthermore, subsection (E) affords the Board such powers as general supervision over public charter schools and the right to contract, sue, and be sued. *Id.* § 59-40-230(E). Prior opinions of this Office recognized members of local school boards exercise sovereign power of the state. Op. S.C. Atty. Gen., May 27, 2004; December 11, 1990; November 18, 1983; February 3, 1978; August 26, 1974; October 16, 1970. Given the power and authority granted to the Board pursuant to subsections (B) and (E), we believe it also exercises the sovereign power of the State in employing its powers and duties. Based on these findings, we assume a member of the Board is an officer for dual office holding purposes.

However, we find it pertinent to note despite the prohibition on dual office holding, our Supreme Court found this prohibition generally does not apply when the individual in question holds one office in an ex officio capacity. In Ashmore v. Greater Greenville Sewer District, 211 S.C. 77, 92, 44 S.E.2d 88, 95 (1947) the Court stated:

The rule here enforced with respect to double or dual officeholding in violation of the constitution is not applicable to those officers upon whom other duties relating to their respective offices are placed by law. A common example is ex officio membership upon a board or commission of the unit of government which the officer serves in his official capacity, and the functions of the board or commission are related to the duties of the office.

*4 The Court then explained the term ex officio means "by virtue of his office." *Id.* (internal quotations omitted). Thus, if membership on a board or committee is ex officio, or by virtue of the person's office, it does not constitute an office for dual office holding purposes. Op. S.C. Atty. Gen., May 27, 2004; July 18, 1989.

The Board consists of eleven members, seven of which are appointed by the Governor based on the recommendation of various entities. In addition, section 59-40-230(A) requires "Membership of the committee must reflect representatives from each of the entities in item (A)(4) or their designee as reflected in their recommendation." This portion of the statute does not specifically state these members serve in an ex officio capacity. However, assuming holding a position in a particular entity constitutes an office, we believe the member's ex officio status may be implied, as these members serve by virtue of their positions with such entities. In an opinion of this Office dated March 13, 2003, we addressed whether a member of the GLEAMNS Human Resource Commission is an officer for dual office holding purposes. Op. S.C. Atty. Gen., March 13, 2003. The Legislature created this commission by statute, which provided "one-third of the Commission must be comprised of 'elected public officials or their representatives unless the number of those officials reasonably available or willing to serve is less than one-third of the membership of the commission.'" *Id.* (quoting S.C. Code Ann. § 43-41-30(A)(1)). The individual in question in that opinion was a Commissioner of Public Works for the City of Greenwood who was asked to serve on the commission in his capacity as a public official. *Id.* The statute creating the commission did not specifically state these commissioners are to serve in an ex officio capacity. However, after looking at prior opinions and other statutes, we surmised:

A review of these statutes and opinions reveals that in some instances membership on the second board, commission, or committee is denominated "ex officio," and in others it is not, though the membership on the first body is always specified (i.e., membership in the General Assembly) as a prerequisite to membership on the second (i.e., Textile Industry Study Committee).

Id. Thus, we concluded although the statute did not specify the elected official or his or her representative is to serve in an ex officio capacity, if appointed to the commission by virtue of such person being a "elected public official," they are deemed ex officio members.

You indicate the EOC appointed Thomas DeLoach, a member of the EOC, to serve on the Board. By this statement, we presume in accordance with section 59-40-230, the EOC recommended Mr. DeLoach to the Governor as is provided under subsection (A). In addition, we presume Mr. DeLoach's appointment is by virtue of the requirement that the Governor appoint a member to the Board who is a member of the EOC or its designee. If such is the case, Mr. DeLoach's appointment to the Board is by virtue of his position on the EOC, which we previously concluded is an office. Thus, Mr. DeLoach serves on the Board in an ex officio capacity. Accordingly, he would not hold an office for dual office holding purposes.

Conclusion

*5 We find Mr. DeLoach's position on the EOC to be an office for dual office holding purposes. However, assuming Mr. DeLoach serves on the Board by virtue of his position on the EOC, his service is in an ex officio capacity. Accordingly, his position on the Board is not an office for dual office holding purposes. Based on these determinations, we find Mr. DeLoach would not violate Article XVII, section 1A of the South Carolina Constitution by simultaneously serving as a member of the EOC and as a member of the Board.

Very Truly Yours,

Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Assistant Deputy Attorney General